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Opinion Committee

MICHAEL P. FLEMING

County Attorney
Harris County, Texas

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FILE # 39546

I.D. # ML-39546-9

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0040-JC

Attention: Ms. Sarah J. Shirley, Chair
Opinion Committee

Re: Payment For Legal Representation
Of State District Judge In
Connection With An Application
For A Writ Of Mandamus
C.A. file # 61,827

Ladies and Gentlemen:

The judge of the 208th District Court has requested that Harris County pay a private lawyer who defended the judge in a mandamus action filed against the judge in a criminal case. Please supply us with your opinion on the question presented. Our memorandum brief is enclosed. If we can provide you with any additional information, please do not hesitate to contact us.

Sincerely,

MICHAEL P. FLEMING
County Attorney

By MARVA M. GAY
Assistant County Attorney

Encl.

MEMORANDUM BRIEF

The judge of the 208th District Court has requested that Harris County pay a private lawyer who defended the judge in a mandamus action filed against the judge in a criminal case. The issue of whether Harris County has a duty to pay for legal representation provided to a state district judge in connection with an application for a writ of mandamus is one of concern for all district courts.

According to information provided to this office, Denise Collins, Judge of the 208th District Court, is seeking \$2,300 for a private attorney who represented her in *Narit Bunchien v. Hon. Denise Collins and Hon. Doug Shaver*, No. 14-96-CV-1514. Narit Bunchien is a defendant in a capital murder case pending in Judge Collins' court. In a letter to Harris County Commissioners Court (attached as Exhibit A), Judge Collins states in pertinent part as follow:

... Mr. Dick DeGuerin represented Mr. Bunchien, and on December 9, 1996 he requested a writ hearing be set since the defendant was being held without bond. Without going into great detail, I set a bond hearing date for January 13, 1997. Mr. DeGuerin wanted an earlier hearing date and approached Judge Doug Shaver who consented to appoint a visiting judge to hear the writ. After talking with me, Judge Shaver changed his mind and declined to hear the writ. Mr. DeGuerin filed a Writ of Mandamus, in essence asking the Court of Appeals to order either me or Judge Shaver to hold an earlier hearing.

First, it was and still is my opinion that it was essential that I be represented by my own lawyer, and not by Ray Speece, who serves as counsel to the district judges and who represented Judge Shaver in this matter, because there was a perceived conflict between my position and that of Judge Shaver. Merely because you are a sitting judge does not mean that you are not entitled to conflict-free counsel rendering effective assistance. See, *Maya v. State*, 932 S.W.2d 633, 635 (Tex. App.—Houston [14th Dist.] 1996) (“Logic dictates that a single lawyer cannot simultaneously represent the conflicting interests of two clients.”).

Second, this mandamus was filed on a Monday, leave granted by the Court of Appeals the next day, briefs were ordered filed the day after that, and oral argument set the day after that. The immediacy of the mandamus action and resulting deadlines required the instant need to retain local counsel. In light of these deadlines, it would have been difficult, if not impossible, for the Attorney General's office, based in Austin, to effectively represent me.

Third, this action of Mr. Wice in representing me benefited all criminal district judges since the Court of Appeals ruled that so long as judges act reasonably, they will not step in and micromanage judges' dockets whenever a defendant is unhappy about a hearing date. They denied the mandamus, declining to order an earlier hearing date.

Finally, there is ample precedent for sitting district judges who have been sued in their official capacity to be able to retain private counsel and seek reimbursement therefor. In an extraordinary instance as this, the importance of my being able to hire such counsel in this case, and to be able to pay counsel for his efforts, cannot be understated.

TEX. GOV'T CODE ANN. § 74.141 (Vernon 1988) provides for the defense of a state district judge in an action in which the judge is a defendant because of the judge's office. TEX. GOV'T CODE ANN. § 74.141 (Vernon 1988) reads as follows:

The attorney general shall defend a state district judge, a presiding judge of an administrative region, or an active, retired, or former judge assigned under this chapter in any action or suit in any court in which the judge is a defendant because of his office as judge if the judge requests the attorney general's assistance in the defense of the suit. [Emphasis added.]

Accordingly, it appears that the State – rather than the County – is authorized by TEX. GOV'T CODE ANN. § 74.141 (Vernon 1988) to pay for the defense of a state district judge in a mandamus action in which the judge is a defendant because of the judge's office. In Tex. Att'y Gen. LA-124 (1996), the Attorney General held as follows:

... We find that the authority to employ outside legal counsel in the discharge and fulfillment of the duties of the attorney general is well within his exclusive authority to control litigation in which the state has an interest

Also see, *Hill v. Texas Water Quality Board*, 568 SW2d 738 (Tex. App.—Austin 1978, writ ref'd n.r.e.), which held that where the Attorney General is authorized to represent an official, “if services of other lawyers are utilized, they must be in subordination to” the attorney general's authority. And see, *United States v. State of Texas*, 680 F.2d 356 (5th Cir. 1982), which held that where the attorney general has the exclusive right to represent an official or agency, “if services of other lawyers are to be had it must be with his decision and in subordination to his authority.”

A county commissioners court is a court of limited jurisdiction. It may exercise only those powers that the state constitution and statutes confer upon it, either explicitly or implicitly. Op. Tex. Att'y Gen. V-1162 (1951) at 2. Also see, *Canales v. Laughlin*, 214 S.W.2d 451, 453 (1948); *Renfro v. Shropshire*, 566 S.W.2d 688, 690 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.); Op. Tex. Att'y Gen. No. JM-887 (1988) at 2; and Op. Tex. Att'y Gen. No. MW-473 (1982) at 1. Consequently, while a commissioners court has broad discretion to exercise powers expressly conferred upon it, the constitution or statutes must provide the legal basis for any action that the commissioners court takes. *Canales*, 214 S.W.2d at 453. We know of no statute that allows the County to provide legal counsel for officers of another governmental body – the State. TEX. LOC. GOV'T CODE ANN. § 157.901 (Vernon Supp. 1997) authorizes the County to pay the legal defense of county officials and employees only.

For the reasons discussed above, Harris County has no authority to pay for Judge Collins' legal representation in a mandamus action in which the judge was a defendant because of the her office as judge. It appears that pursuant to TEX. GOV'T CODE ANN. § 74.141 (Vernon 1988), the State is responsible for the judge's defense. Under these facts, it appears that Judge Collins could apply to the Attorney General for payment as well as for direction on the proper procedure to assure effective legal representation should a similar circumstance occur in the future.